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In the Supreme Court
of the
United States

October Term, 1970

No.

Charles Sellers, Richard Strohman, and Bruce Kirmmse, individually and as members of the Campus Draft Opposition, on behalf of themselves and others similarly situated,

Petitioners,

vs.

The Regents of the University of California, a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

Petitioners Charles Sellers, Richard Strohman, Bruce Kirmmse and the Campus Draft Opposition, pray that a Writ of Certiorari issue to review the

opinion and judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on September 17, 1970.

OPINION BELOW

The opinion of the Court below is not yet reported. It is reproduced as Appendix A herein. The District Court issued no opinion when dismissing petitioners' complaint, but merely an order. A "Memorandum of Decision" was filed at the time petitioners were denied temporary relief; it is reproduced as Appendix B.

JURISDICTION

The opinion and judgment of the Court below was entered on September 17, 1970. By order entered December 11, 1970, Mr. Justice Douglas extended petitioners' time in which to file a petition for writ of certiorari to and including December 30, 1970. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a prior restraint prohibiting "unlawful activity," when interpreted to prohibit a peaceable assembly to honor men who, because of conscience, refuse to participate in the Armed Forces during the Viet Nam War, to be held on state university facilities generally used for meetings of all

sorts, conflicts with the First and Fourteenth Amendments.

2. Whether the prior restraint described in paragraph (1) may constitutionally avoid judicial review and superintendence in application when deemed "reasonable."

3. Whether the constitutionality of the prior restraint described in paragraph (1) above, when promulgated by a state administrative board acting under state statute, presents a substantial federal question requiring the convening of a three-judge court.

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

United States Constitution, First Amendment:

> "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble. . . ."

United States Constitution, Fourteenth Amendment:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

University of California Regents' Resolution of October 20, 1967:

"University facilities shall not be used for the purpose of organizing or carrying out unlawful activity."

STATEMENT OF THE CASE

Petitioners are members of an unincorporated association on the Berkeley campus of the University of California. The association, known as the Campus Draft Opposition, is composed of faculty and students and is a "registered campus organization" authorized by the agents of the respondent Regents of the University of California. (C.T. 1.)

The purpose of the organization is to provide support for young men who, for reasons of conscience, believe that the actions of the United States in Viet Nam are unjust and immoral and feel that, for that reason, they cannot participate in those actions by serving in the armed forces of the United States. For several months prior to the filing of the action in the District Court petitioners had pursued that purpose on the Berkeley campus by means of various meetings, by leafleting and by providing informational services.

On February 26, 1968, petitioners applied, through the established administrative channels, for the use of the Greek Theater at the Berkeley campus of the University of California for the purpose of holding an assembly on May 17, 1968. The program to be presented to the assembly was to be entitled "Viet Nam Commencement" and was for the purpose of honoring those young men who had taken the position that

they could not morally participate in the armed forces during the Viet Nam conflict. Commitments from major speakers from areas outside of Northern California were sought and plans were commenced for an extensive and dignified ceremony on May 17, 1968.

On March 4, 1968, petitioner Richard Strohman received a communication from Vice-Chancellor William Boyd of the University which stated that the request to use the Greek Theater on May 17, 1968, had been approved subject to three conditions. The conditions were:

> (1) That the use comply with the requirements for use of the Greek Theater;
>
> (2) That petitioners make clear through their publicity that the event was not sponsored or approved by the University of California;
>
> (3) That the planned use of the facility is not illegal. (R.T. 3-4.)

In order to determine whether condition 3 would be fulfilled the University submitted the matter to Thomas Cunningham, general counsel of respondent Regents of the University of California.

General Counsel Cunningham, in a communication to Vice-Chancellor Boyd on March 14, 1968, questioned whether the campus draft opposition should have been registered as a student organization at all because its activities "might be in violation of . . . the Selective Service Act" and concluded that the May 17th event would result in "violations of the Selective

Service Act [specifically, 50 U.S.C. Appendix, Sec. 462(a)]" and therefore would not be consistent with a resolution adopted by respondent Regents on October 20, 1967, which provides:

> "University facilities shall not be used for the purpose of organizing or carrying out unlawful activity". (R.T. 4, 2.)

On March 26, 1968, petitioners resubmitted an application for the use of the Greek Theater on May 17th. This application, to Berkeley Chancellor Roger W. Heyns, stated that Dr. Robert M. Hutchins, former president of the University of Chicago and now director of the Center for the Study of Democratic Institutions, would be the principal speaker and attempted, additionally, to respond to objections raised by General Counsel Cunningham. As to the latter point, the petitioners stated that:

> "Through our registration form, in our continuing daily activity on campus, and in formulating our plans for the Viet Nam Commencement, we have repeatedly demonstrated our intention not to act outside the law."

The letter went on to state:

> "All public statements about the Viet Nam Commencement will stress the fact that it is sponsored by the Campus Draft Opposition and not by the University of California or any other agency or group. Furthermore the format of the ceremony will deliberately avoid mimicking any official University ceremony or creating any mistaken impression as to its nature or sponsorship. The program will be simple and will focus at-

tention upon the young men who have decided to refuse military service, and that thus there will be, for instance, no academic procession, wearing of academic gowns, or presenting of 'honorary degrees.' In this respect, our plans have been changed from those tentatively announced earlier. There will also, of course, be no fund raising other than as prescribed in the University-wide and campus regulations governing such events, and such matters as janitorial and police services will be worked out in accordance with University regulations and in cooperation with the proper campus authorities." (R.T. 4-5.)

On March 29, 1968, Vice-Chancellor Boyd submitted the application of March 26, 1968, to General Counsel Cunningham and asked whether the holding of the exercises described in this revised proposal would be illegal. On April 3, 1968, General Counsel Cunningham advised Vice-Chancellor Boyd that:

"It continues to be my opinion that violations of the Selective Service Act will occur in the course of the event if it is held as proposed. . . . Realistically, however, one cannot ignore the fact that the basic purposes of the proposed 'commencement' are (1) to honor draft eligible men who have signed a pledge of refusal to serve in the armed forces, and (2) to demonstrate CDO's assurance of support, financial and otherwise, to such persons and others who may refuse induction. Thus, the very nature of the proposed event, with these central aspects of honoring and pledging assistance, is such as to counsel, aid or abet draft eligible men to refuse induction." (R.T. 5-6.)

On April 10, 1968, Vice-Chancellor Boyd advised petitioners that University policy required that the Chancellor's office accept the advice of General Counsel Cunningham that the use of the Greek Theater proposed by petitioners would be "for an illegal act" and, on this ground, denied petitioners' application for the use of the Greek Theater on May 17, 1968. Petitioners appealed Chancellor Boyd's denial of their application to respondent Regents of the University of California on April 12, 1968. Respondent, meeting in plenary session at Davis California, on April 19, 1968, denied the appeal of the Campus Draft Opposition for the following reasons:

> "After giving full consideration to the appeal and material submitted in support of it (Viet Nam Commencement) and the opinion of the general counsel that violations of law will occur in the course of the event if held as proposed, and it appearing that because of the history and format of the proposed 'commencement' it would be widely regarded as being a University ceremony if held on the campus, it is the determination of the Regents that permission should not be granted for the holding of the proposed 'Viet Nam Commencement'." (R.T. 6.)

On May 9, 1968, petitioners filed in the District Court a "Complaint for Injunctive Relief, Declaratory Judgment, and Damages," alleging that the denial by respondent of the permit to hold the Viet Nam Commencement was a violation of 42 U.S.C. Sec. 1983 in that it abridged their rights to freedom of speech, association and assembly and the equal protection of

the laws guaranteed by the Fourteenth Amendment to the United States Constitution. The pleading prayed for a temporary restraining order or a preliminary injunction restraining respondent and its agents and employees from prohibiting petitioners' meeting of May 17, 1968; requested that respondent be ordered to show cause why such relief should not be granted; asked for a declaration that the pertinent part of respondent Regents' resolution of October 20, 1967, be held an unconstitutional prior restraint of free expression and assembly; and asked that petitioners be awarded monetary damages in a sum in excess of $6,000.00 for each plaintiff should the meeting of May 17, 1968, not be held by reason of the action of respondent. (R.T. 1-11.)

On May 15, 1968, respondent filed its "Memorandum of Points and Authorities in Opposition to Granting of Preliminary Injunction," setting forth its reasons and legal authorities for denying the permit to use the Greek Theater. (R.T. 57-113.) On May 16, 1968, the Honorable William T. Sweigert, United States District Judge, filed his "Memorandum of Decision" denying the preliminary injunction. (R.T. 114.) Judge Sweigert gave as his reasons for denying the preliminary injunction that:

> "The plaintiff committee has failed to show that, absent such a preliminary injunction, it will sustain irreparable injury; that plaintiff committee has failed to show that the refusal of their application by the Chancellor on March 14 and affirmance of that refusal by the Board of Regents on April 19, was not a reasonable exercise of the

> powers vested by the law of California in the Board of Regents and, through that Board, in the Chancellor; that plaintiff committee has failed to show that any claimed limitation upon their First Amendment rights of freedom of speech and assembly, resulting incidentally from the refusal to permit the 'commencement' as proposed, is not reasonably justified by the valid interest of the University in maintaining good order and decorum on its campus." (R.T. 115-116.)

On July 19, 1968, petitioners filed their amended complaint (R.T. 117) alleging that each of them intended to continue the activities of the Campus Draft Opposition, as described in the original complaint, during the academic year commencing in September of 1968 and so long thereafter as the Selective Service System continued to affect students, employees and faculty at the University of California.[1]

The amended complaint further challenged, as an unconstitutionally vague and overbroad restriction on freedom of expression and assembly, the respondent Regents' resolution of October 20, 1967 (R.T. 118), and it requested that a three-judge court be convened to enjoin and restrain the enforcement of the Regents' resolution (R.T. 119).

On September 25, 1968, the Honorable Lloyd H. Burke, Judge of the United States District Court,

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[1]The amended complaint also challenged the constitutionality of 50 U.S.C. Appendix § 462(a), the section upon which counsel Cunningham had relied in labeling the assembly "unlawful." Petitioners are abandoning that contention in this petition.

entered an order denying petitioners' request that a three-judge court be convened, granting defendant's Motion to Dismiss and dismissing the case. (R.T. 168.) Judge Burke's order was affirmed by the United States Court of Appeals for the Ninth Circuit, Judge Ferguson dissenting,[2] on September 17, 1970.

REASONS FOR GRANTING THE WRIT

In *Pinkings v. Bruce*,[3] the Eighth Circuit observed: "We have been unable to find a single case decided in the 1960's in which a speaker ban has been upheld by a federal court." By "speaker ban" the Court, as the authorities it cited[4] invalidating speaker bans indicated, meant a speaker ban on a college campus. It is now 1970 and there is such a case. This one. The Ninth Circuit's opinion upholds a prior restraint on speech and assembly that is practically limitless. The restraint permits university authorities to deny the

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[2]Judge Ferguson's opinion is denominated a "Dissenting and Concurring Opinion." Judge Ferguson's concurrence, however, was confined to denying petitioners relief on their contention that 50 U.S.C. Appendix § 462(a) is unconstitutional. Since petitioners are abandoning that contention, Judge Ferguson's opinion, for purposes of this petition, is properly characterized as "dissenting."

[3]430 F.2d 595, 598-599 (8 Cir. 1970) (footnote omitted).

[4]The authorities were: *Brooks v. Auburn University*, 412 F.2d 1171 (5th Cir. 1969); *Stacy v. Williams*, 306 F.Supp. 963 (N.D. Miss. 1969) (three-judge court); *Smith v. University of Tennessee*, 300 F.Supp. 777 (E.D. Tenn. 1969); *Snyder v. Board of Trustees of University of Illinois*, 286 F.Supp. 927 (N.D. Ill. 1968) (three-judge court); *Dickson v. Sitterson*, 280 F.Supp. 486 (M.D.N.C. 1968) (three-judge court); *Student Liberal Federation v. Louisiana State University*, Civ. No. 68-300 (E.D. La. February 15, 1968). With the exception of the unreported Louisiana case, all of the authorities were brought to the attention of the Court below—and ignored by the Court below.

right to assemble in a forum generally open for assembly if, in the opinion of university counsel, the assembly will be an "unlawful" activity. In the instant case the restraint was enforced in a manner which deprived persons of the right of assembly whose announced purpose was to hold a meeting to advance the very ideas held constitutionally protected by this Court in *Bond v. Floyd*, 385 U.S. 116 (1966),[5] and who, in every way possible, assured the university that their assembly would be non-violent and lawful. The Ninth Circuit held the restraint "reasonable" (hence, under its analysis, beyond judicial review)[6] and injunctive relief inappropriate because all petitioners had lost was a forum![7]

As the observation of the *Pickings* Court suggests, the Ninth Circuit opinion is an aberration, a sport if you will, in the law of prior restraint. It conflicts with three-judge court opinions, Courts of Appeals decisions and decisions of this Court. Stern and Gressman[8] abjure us, in this petition, carefully to distinguish between a "true" conflict and a conflict "in principle." We shall attempt to demonstrate *infra* that there is, indeed, a "true" conflict between the opinion below and Fifth Circuit opinions. But of even more significance are the "principle" conflicts of the Ninth Circuit opinion. There is, we think, no area of First Amendment law relevant to this case with which the opinion

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[5]I.e., to honor young men who, because of conscience, refused to participate in the armed forces during the Viet Nam War.

[6]Appendix A, pp. xi-xii.

[7]Appendix A, p. vii.

[8]Stern and Gressman, *Supreme Court Practice* (4th Ed. 1969).

below can be reconciled. It contradicts, both substantively and procedurally, traditional rules of prior restraint. It permits the suppression of views held constitutionally protected by this Court. It also diverges from established law in the areas of equitable relief, mootness and three-judge court jurisdiction.

It is these multi-faceted departures from pertinent First Amendment law that make this case such a crucial one. Were the impact of the Ninth Circuit's opinion limited to the enforcement of prior restraints in the 25,000 to 30,000 member Berkeley University community this would be a case involving a significant diminution of precious First Amendment liberties. But its impact is not limited to Berkeley nor to the state-wide University of California community nor even to the university communities of the Western United States. For the underlying rationale of the Ninth Circuit opinion is that, apart from First Amendment activities conducted in one's home or at private business establishments, governmental prior restraints on the content of expression will be sustained where "reasonable" and are not subject to judicial superintendence. See Appendix A, p. xii. Thus the right to expression in public places, free of content censorship except in the most extraordinary of circumstances,[9] is now in question in the Ninth Circuit.

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[9]See, e.g., *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969), and *Carroll v. Commissioners of Princess Anne*, 393 U.S. 175 (1968).

I

THERE IS A CONFLICT BETWEEN THE FIFTH AND NINTH CIRCUITS.

Petitioners challenge a regulation, as vague and overbroad, which prohibits "unlawful activity" on university facilities and is interpreted by respondent to include advocacy which university counsel, in his unguided discretion, deems "unlawful" because of its content. In *Brooks v. Auburn University*, 412 F.2d 1171 (5 Cir. 1969), the Fifth Circuit upheld a District Court injunction restraining a speaker ban enforced by a university president. The president's ban barred "one advocating lawlessness" from addressing the students.

The Fifth Circuit said:

> "Here there was no claim that the Reverend Coffin's appearance would lead to violence or disorder or that the university would be otherwise disrupted. There is no claim that Dr. Philpott could not regulate the time or place of the speech or the manner in which it was to be delivered. The most recent statement of the applicable rule by the Supreme Court, perhaps its outer limits, is contained in the case of Brandenburg v. Ohio, decided June 9, 1969, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430:
>
> > "* * * These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. * * *"

See also *Bond v. Floyd*, 1966, 385 U.S. 116, 134, 87 S.Ct. 339, 17 L.Ed.2d 235. There was no claim that the Coffin speech would fall into the category of this exception."

412 F.2d at 1173.[10]

The Fifth and Ninth Circuits, confronted with legally indistinguishable college speaker ban regula-

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[10]The *Brooks* rule has been consistently followed in the Fifth Circuit. In *Stacy v. Williams*, 306 F.Supp. 963 (N.D. Miss. 1969) (three-judge court) the Court struck down speaker bans which, among other things, prohibited speeches by persons who advocated overthrow of the government. The *Stacy* court said:

"To satisfy the clear and present danger test, there must be a finding by proper authority 'either that immediate serious violence [or other substantive evil] was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated,' wrote Mr. Justice Brandeis, in concurring opinion in *Whitney v. California*, 274 U.S. 357, 376, 47 S.Ct. 641, 648, 71 L.Ed. 1095, 1106 (1927). This guide was followed by Mr. Justice Black in *Bridges v. California*, 314 U.S. 252, 263, 62 S.Ct. 190, 194, 86 L.Ed. 192, 203 (1941), by stating it to be 'a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high' before utterances can be proscribed. Also there must be recognized the material difference between speech which agitates and exhorts, calling for present violent action creating clear and present danger of serious substantive evil, which may assuredly be prohibited, and speech which is mere doctrinal justification of a thought or idea, leaving an 'opportunity for general discussion and the calm process of thought and reason', which cannot be prohibited. This last principle was recently reiterated by the Supreme Court when it declared that 'a statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments', and 'it sweeps within its condemnation speech which our Constitution has immunized from governmental control'." (*Id.* at 972) (footnotes omitted).

Stacy, in turn, was followed in *Molpus v. Fortune*, 311 F.Supp. 240 (N.D. Miss. 1970) in which a speaker ban was disapproved because the university had not shown that the proposed speech, even if it included advocacy of unlawful acts, would likely produce unlawful action. The Fifth Circuit has declined to vacate the District Court order pending appeal because, in its view, it is unlikely that the university will prevail on the merits. *Fortune v. Molpus*, 431 F.2d 799 (5 Cir. 1970).

tions, have reached opposite conclusions. There is, therefore, a different degree of First Amendment protection according to where in the United States one attends (or teaches at) a university. And, indeed, it is only university communities within the Ninth Circuit where full First Amendment protection is not enjoyed. Every other federal court when passing upon a similar prior restraint has applied the legal principles adopted by the Fifth Circuit. See cases collected in footnote 4, *supra*.

This conflict in the narrowest sense between the Fifth and Ninth Circuits, and conflict in principle between the Ninth Circuit and all other federal courts which have passed on similar questions, is of particular concern to petitioners for it is their First Amendment rights that are extinguished. The rule that obtains elsewhere is clearly more consonant with the First Amendment than the rule announced below.

The Ninth Circuit rule is predicated on the assumption that the state may do whatever it wishes with state property, including censorship of the content of speech. The Court below ignored *Brooks*, and all other decisions to the contrary, placing reliance on *Adderly v. Florida*:

> "As stated in *Adderly v. Florida*, 385 U.S. 39, 47 (1966), 'the state no less than a private owner of property, has the power to preserve the property under its control for the use to which it is lawfully dedicated.' Here, appellee in the exercise of its power to govern the University and in pursuit of a valid interest in that area, at most, has only incidentally infringed on First Amend-

ment freedoms. Such being the case the regulation is not constitutionally infirm." (Appendix A, p. x).

There are two reasons why the Circuit Court's reliance on *Adderly* is misplaced:

a) The unflattering analogy between a school and a jail has previously been disapproved by this Court:

> "In Hammond v. South Carolina State College, 272 F.Supp. 947 (D.C. S.C. 1967), District Judge Hemphill had before him a case involving a meeting on campus of 300 students to express their views on school practices. He pointed out that a school is not like a hospital or a jail enclosure. Cf. Cox v. Louisiana, 379 U.S. 536, 13 L.Ed.2d 471, 85 S.Ct. 453 (1965); Adderly v. Florida, 385 U.S. 39, 17 L.Ed.2d 149, 87 S.Ct. 242 (1966). It is a public place, and its dedication to specific uses does not imply that the constitutional rights of persons entitled to be there are to be gauged as if the premises were purely private property. Cf. Edwards v. South Carolina, 372 U.S. 229, 9 L.Ed.2d 697, 83 S.Ct. 680 (1963); Brown v. Louisiana, 383 U.S. 131, 15 L.Ed.2d 637, 86 S.Ct. 719 (1966)."
>
> *Tinker v. Des Moines Community School District*, 393 U.S. 503, 512, fn. 6 (1969).[11]

b) *Adderly* did not involve content censorship but rather the interdiction of *any* First Amendment activities in an area deemed inappropriate for their

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[11] And, it should be emphasized, we are here dealing with adults, not juveniles. We are dealing with faculty and students of an American University, a place in which First Amendment values are particularly prized. See *Keyishian v. Board of Regents of New York*, 385 U.S. 589 (1967).

exercise. In *Adderly* this Court was not concerned with an official power to pick and choose which ideas were to be exposed in a particular place but, rather, whether officials had the power to foreclose assembly altogether in a particular place. In the instant case, on the other hand, we are dealing with an open air theater generally used for the expression of all ideas by members of the university community. (See Judge Ferguson's dissenting opinion, Appendix A, p. xvii). Once the university opened the theater for the purpose of assembly it could not, constitutionally, interdict the expression of constitutionally protected ideas. *Cox v. Louisiana*, 379 U.S. 536, 555-558 (1965).[12]

Adderly, then, has been misread and misapplied in a fashion which deprives petitioners of First Amendment rights and places the Ninth Circuit in conflict with all recent federal decisions of a similar nature.

II

THE OPINION BELOW CONFLICTS WITH OPINIONS OF THIS COURT.

We have said that the opinion below cannot be reconciled with any of the fundamental First Amendment principles announced by this Court. What follows is a concise recitation of the conflicts:

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[12]Other federal university speaker ban decisions have recognized that once the forum is open, government cannot censor the content of expression. See, e.g., *Stacy v. Williams*, *supra*, 306 F.Supp. at 970, fn. 9, fn. 11, 971, 974; *Smith v. University of Tennessee*, 300 F.Supp. 777, 781 (E.D. Tenn. 1969); *Dickson v. Sitterson*, 280 F.Supp. 486, 497 (M.D. N.C. 1968) (three-judge court).

a) The Ninth Circuit determined that the University's decision to ban the assembly was "reasonable" and therefore beyond challenge. Appendix A, pp. xi-xii. By applying the customary reasonableness standard to a case of First Amendment prior restraint the Court of Appeals has inverted priorities and reversed burdens. The rule of this Court has been: "A system of prior restraints comes to this Court bearing a heavy presumption against its constitutional validity." *Carroll v. Commissioners of Princess Anne*, 393 U.S. 175, 181 (1968); *Freedman v. Maryland*, 380 U.S. 51 (1965); *Bantam Books v. Sullivan*, 372 U.S. 58 (1963). They are "a form of infringement of freedom of expression to be specially condemned." *Joseph Burstyn v. Wilson*, 343 U.S. 494, 504 (1952).

b) The Ninth Circuit held that judicial superintendence of prior restraints on content is limited to "obscenity" cases where a private home or business is concerned. Appendix A, p. xii. This Court has said that is not so in *Shuttlesworth v. Birmingham, supra*, 394 U.S. at 155, fn. 4 (and see concurring opinion of Harlan, J.); Cf. *Carroll v. Commissioners of Princess Anne, supra.*

c) Petitioners attack a prior restraint on "unlawful" speech as vague and overbroad. The Ninth Circuit repelled the challenge. But the speech proposed was indistinguishable from speech held constitutionally protected by this Court in *Bond v. Floyd, supra;* neither the university nor the Court of Appeals has ever suggested that the advocacy proposed by petitioner was unlawful advocacy within the mean-

ing of this Court's opinion in *Brandenburg v. Ohio*, 394 U.S. 444 (1969). The Ninth Circuit opinion is inconsistent with *Hague v. C.I.O.*, 307 U.S. 496, 516 (1939). There it was held that an unguided discretion to deny a permit even when an official is of the opinion that "riots, disorders, or disorderly assemblage" may occur is overbroad. The Ninth Circuit opinion also conflicts with this Court's holding in *Carroll v. Commissioners of Princess Anne, supra*, 393 U.S. at 183, that a prior restraint is overbroad unless "couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of public order."

d) The Court of Appeals held injunctive relief inappropriate because petitioner had only (!) been denied a forum for the exercise of First Amendment rights. Appendix A, p. vii. That conflicts with this Court's observation in *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965), that infringement of First Amendment rights produces irreparable injury, and this Court's holding in *Hague v. C.I.O., supra*, that injunctive relief is appropriate where a prior restraint is depriving petitioners of access to a publicly maintained forum. (See Judge Ferguson's dissenting opinion. Appendix A, p. xxvii).

e) The Court of Appeals decision seems to hold that petitioners' case is moot (Appendix A, pp. vii, xiii) but then, oddly enough, goes on to resolve the issues against them. The mootness suggestion is at odds with the rule of *Carroll v. Commissioners of Princess*

Anne, supra. This Court there held that where a prior restraint has prohibited persons from holding a meeting and the censor persists in its policies the issues are not moot even though the date for the proposed meeting has passed. "The underlying question persists and is agitated by the continuing activities and programs of petitioners: whether, by what processes, and to what extent the authorities of the local governments may restrict petitioners in their rallies and public meetings." (393 U.S. at 179) Had petitioners been successful in the District Court could it seriously be argued on respondent's appeal that the case was moot because the meeting had already occurred? If so, it would mean that no appellate review could ever be had of a District Court prior restraint decision. If not, it would mean that a decision favorable to petitioners could be reviewed but a decision adverse to petitioners could not be reviewed. The Court of Appeals notes that petitioners' on-going program has not included assemblies like the one prohibited (Appendix A, pp. vii, xiii) but that, of course, is because applications for such assemblies are fruitless until the Regents' Resolution prohibiting such assemblies is struck down.

III

THE COURT OF APPEALS EXCEEDED ITS JURISDICTION BY PASSING ON THE MERITS OF THE CASE.

Petitioners challenged an administrative rule of statewide application. They raised a substantial federal question. Accordingly, a three-judge court

should have been convened to consider their claim. 28 U.S.C. §2281; see dissenting opinion of Judge Ferguson, Appendix A, pp. xxi-xxvi. Because a three-judge court was the only court, other than this Court, with jurisdiction to consider the merits, the Ninth Circuit exceeded its jurisdiction by resolving the issues against petitioners. Since this Court does have jurisdiction to consider the claims of petitioners they do not emphasize this point but only preserve it as an alternative reason for granting the writ and reversing the decision below.

CONCLUSION

For the aforementioned reasons, petitioners respectfully submit that the petition for a writ of certiorari should be granted.

Dated: December 28, 1970.

Respectfully submitted,

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American Civil Liberties Union
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Attorneys for Petitioners.

(Appendices A and B Follow)

Appendix A

United States Court of Appeals
for the Ninth Circuit

No. 23,581

CHARLES SELLERS, RICHARD STROHMAN, and BRUCE KIRMMSE, individually and as members of the Campus Draft Opposition, on behalf of themselves and others similarly situated,
Appellants,

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, a corporation,
Appellee.

[September 17, 1970]

Appeal from the United States District Court
Northern District of California

Before: Kilkenny and Trask, Circuit Judges, and Ferguson, District Judge.*

Kilkenny, Circuit Judge:

Appellants appeal from an order of the district court dismissing their complaint. Appellee is a cor-

*The Honorable Warren Ferguson, United States District Judge for the Central District of California, sitting by designation.

poration authorized, formed and existing under the Constitution of the State of California.[1] We treat the dismissal as a summary judgment under Rule 56, FRCivP.

The facts alleged in appellants' complaint, amended complaint and supporting affidavits are essentially undisputed. They are members of a campus organization of the University of California, known as Campus Draft Opposition (CDO). On February 26, 1968, they applied, through proper channels, for the use of the GREEK THEATRE, a building on the Berkeley campus, for the purpose of holding an assembly on May 17, 1968. The proposed program was entitled "Vietnam Commencement," and was initiated for the purpose of honoring young men who had taken a pledge not to serve in the armed forces during the Vietnam conflict. On March 4, 1968, an authorized officer of the University informed appellants that the proposed use of the building had been approved subject to three conditions: (1) that the use comply with the established requirements; (2) that appellants make clear through their publicity that the event was not sponsored or approved by the University; and (3) that the appellants' use of the facility would not be illegal.

Concerned with the legality of the proposed assembly, the officials of the University desired a formal opinion and submitted the problem to the general counsel of the appellee. He was of the opinion that the proposed use of the building would be in viola-

[1]Cal. Const., Art. IX § 9.

tion of 50 U.S.C. App. § 462(a),[2] and he so advised the University officials in charge. Likewise, it was the opinion of the general counsel that the proposed function would be in conflict with appellee's resolution of October 20, 1967, which provides:

> "University facilities shall not be used for the purpose of organizing or carrying out unlawful activity."

Subsequently, appellants submitted another application in which they assured the authorities that the proposed event would avoid mimicking the official University commencement and would be publicized in such a manner so as to make clear that it was not a University sponsored function. This application contained the following language: "Through our registration form, in our continuing daily activity on campus, and in formulating our plans for the Vietnam Commencement, we have repeatedly demonstrated our intention not to act outside the law."

The second application was submitted to the general counsel who reiterated his opinion that the proposed event would violate the law.[3]

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[2] [Any person] . . . who knowingly counsels, aides, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title . . . or who in any manner shall knowingly . . . hinder or interfere or attempt to do so in any way, by force or violence or otherwise with the administration of this title . . . or the rules or regulations made pursuant thereto, or who conspires to commit any one or more of such offenses shall [be subject to criminal prosecution]."

[3] "It continues to be my opinion that violations of the Selective Service Act will occur in the course of the event if it is held as proposed . . . one cannot ignore the fact that the basic purposes of the proposed 'commencement' are (1) to honor draft eligible men who have signed a pledge of refusal to serve in the armed forces, and (2) to demonstrate CDO's assurance of support, financial and otherwise, to such persons and others who may refuse induction."

The Chancellor, acting on the advice of the general counsel, denied appellants the use of the theatre. Appellants appealed to appellee. Acting on the opinion of its general counsel, appellee affirmed the decision of the Chancellor.

Appellants, on May 9, 1968, filed a complaint in the lower court seeking an injunction, declaratory judgment and damages. They alleged that the action of appellee abridged their constitutional rights to freedom of speech and assembly and equal protection of the laws. On May 16th, a district judge denied a preliminary injunction on the ground that appellants failed to show either that irreparable harm was threatened or that appellee's action was not reasonably justified by the valid interest of the University in maintaining order and decorum on its campus.

To forestall mootness, appellants then filed an amended complaint alleging that they would continue their activities as members of the CDO and that appellee would continue to rely upon the resolution of October 20, 1967, and 50 U.S.C. App. § 462(a), to deny them full freedom of speech and assembly. Additionally, they allege that the resolution was unconstitutional in that it was overbroad, vague and failed to provide adequate procedural safeguards for the protection of First Amendment rights. They also alleged that appellee acted unreasonably in denying them the use of the Greek Theatre. In this complaint, appellants sought the convention of a three-judge court, an injunction against the enforcement of the resolution and § 462(a) and a declaratory judgment

that the resolution and the statute were unconstitutional on their face, or as applied. Damages were sought under the provisions of 42 U.S.C. § 1983.

After affidavits had been submitted by both sides and appellants had declined the opportunity to further amend their complaint, a single district judge dismissed the complaint pursuant to appellee's motion. Our jurisdiction to hear the appeal is not questioned. *Wilson v. City of Port Lavaca*, 391 U.S. 352 (1968); *Schackman v. Arnebergh*, 387 U.S. 427 (1967).

Treating the dismissal of the district court as a summary judgment under Rule 56, FRCivP, we affirm the judgment, although not necessarily on the grounds on which the lower court relied. This is our prerogative. *Jaffke v. Dunham, Trustee*, 352 U.S. 280, 281 (1957); *M.O.S. Corp. v. John I. Haas Co.*, 375 F.2d 614, 617 (9th Cir. 1967); *Rizal Commercial Banking v. Putnam*, ... F.2d ..... (9th Cir., July 10, 1970).

Presented for decision are two basic issues: (1) did the lower court err in failing to convene a three-judge court to consider the constitutionality of that portion of 50 U.S.C. App. § 462(a) which prohibits the counseling, aiding or abetting of another to refuse registration or service in the Armed Forces and, (2) did the lower court err in failing to convene a three-judge court to consider the constitutionality of the resolution promulgated by appellee.

(1) 28 U.S.C. § 2282 prohibits an injunction restraining the enforcement of an Act of Congress unless the application therefor is heard and determined

by a district court of three judges. In this case, however, there is no threat of enforcement of § 462(a). Appellee is powerless to enforce it and there is no showing that federal authorities have any intention of prosecuting appellants under its terms. For that matter, no one with power to enforce the provision of § 462(a) is a party to this proceeding. Consequently, on the record before us, an injunction against enforcement of that section is not proper. *Congress of Racial Equality v. Douglas,* 318 F.2d 95 (5th Cir. 1963); *New Standard Publishing Co. v. Federal Trade Commission,* 194 F.2d 181 (4th Cir. 1952). Moreover, the prime prerequisite of injunctive relief, the threat of irreparable future harm that might be caused by enforcement of § 462(a), is totally lacking. That statute is only collaterally involved and no threat or fear of prosecution under its terms is alleged. *Cameron v. Johnson,* 390 U.S. 611, 619-620 (1968).

(2) We now approach appellants' claim for injunctive relief under 28 U.S.C. § 2281.[4] Assuming arguendo, that the appellee's resolution, which is applicable to nine state university campuses throughout California, is of statewide application and thus qualifies under the terms of § 2281 as construed in *Sailors v. Board of Education of Kern County,* 387 U.S. 105

[4] "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

(1967); *Gilmore v. Lynch*, 400 F.2d 228 (9th Cir. 1968); and *Marshall v. Sawyer*, 301 F.2d 639 (9th Cir. 1962), we are still at a loss to find a basis for injunctive relief on this record. Appellants, for some time, had been actively pushing their program on the campus. They had circulated form pledges which would require the signer to promise that he would refuse to serve in the military on the grounds of moral objection to the war in Vietnam. They had publicized other pledges offering support in the form of "encouragement, counsel, and financial aid" to those signing the pledge. These, and other activities, had taken place openly after the passage of the resolution, but no one interfered with appellants' activities. They allege that they will continue such activities, but do not allege that any event similar to the Vietnam Commencement is planned for the future. In these circumstances, it is impossible to find a threat of irreparable harm, nor can we find any "chilling effect" upon First Amendment rights. This is true since the only threatened penalty, should some future unspecified event be found in violation of the resolution, would be the denial of the use of campus facilities.

In the light of this factual background, we hold that a remand for consideration by a three-judge court would be a misuse of the judicial function and an action which would be beyond the requirements of the statutes or the policy behind them. Time and time again the Supreme Court has warned us that the three-judge court legislation is to be narrowly

construed. *Mitchell v. Donovan*, ... U.S. ..... (June 15, 1970); *Bailey v. Patterson*, 369 U.S. 31, 33 (1962); *Phillips v. United States*, 312 U.S. 246, 251 (1941). The statute was patterned to prevent the possibility of a single judge bringing to a halt the application of the legislative process. Its purpose is the protection of the legislative branch from judicial interference. *Goldstein v. Cox*, 396 U.S. 471, 476-477 (1970); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 154 (1963).

Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 715 (1962), fixes three guidelines for district judges to follow in deciding whether to ask for the convention of a three-judge court. They are: (1) whether the constitutional question raised is substantial; (2) whether the complaint at least formally alleges the basis for equitable relief; and (3) whether the case presented otherwise comes within the requirements of the three-judge statute. Assuming, without deciding, that a substantial constitutional question has been raised, we, nevertheless, hold that the second requirement has not been met. The total lack of party jurisdiction of the district court to grant the injunctive relief as to § 462(a) and the inappropriateness of an injunction under the facts alleged concerning appellee's resolution justified the dismissal by the district judge.

The statutes under scrutiny are applicable only when injunctive relief is at issue. Three-judge courts are not required to grant declaratory judgments. *Mitchell v. Donovan, supra; Rockefeller v. Catholic Medical Center*, 397 U.S. 820 (1970), *Goldstein v. Cox*,

supra; Kennedy v. Mendoza-Martinez, supra. Kennedy is instructive. There, the plaintiff amended his complaint late in the proceedings to add a prayer for injunctive relief to his request for a declaratory judgment. The Supreme Court held that, since the district judge decided the case solely on the issue of the declaratory judgment and did not regard the prayer for injunctive relief as material to the disposition of the case, there was no need for a three-judge court. Here, although the court dealt with the injunction issue, the pleadings and affidavits are insufficient to state a claim for injunctive relief.

On the record as a whole, we hold that the district judge properly refused to request the convention of a three-judge court. To hold otherwise would impart magical powers to the word "injunction" by allowing the word itself to force the convention of a three-judge court without reference to the adequacy of the supporting allegations. Since there was no threat of irreparable harm and no chilling effect on First Amendment rights. *Zwickler v. Koota*, 389 U.S. 241 (1967); *Dombrowski v. Pfister*, 380 U.S. 479 (1965), injunctive relief was properly denied.

Normally, having decided the appeal on other grounds, we would not speak to the constitutionality of the appellee's resolution. Here, however, the issue has been exhaustively briefed and ably argued and, since there is a likelihood of the case reaching the Supreme Court, we feel we should express our views on the issue. For proper construction, the resolution must be placed under the searchlight of the entire

regulatory scheme of the University, including the resolution enacted on the same day stating that: "The advocacy and content of speech at University facilities cannot and shall not be restricted beyond the purview of the First and Fourteenth Amendments to the Constitution." Placed in this light, the questioned resolution is clearly aimed at activities, as distinguished from pure speech. Beyond doubt, appellee in its role as administrator of the University system has a vital interest in preventing illegal activity on the campus. *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966).

The resolution, as we read it, is neither overbroad in terms of appellee's valid interest in the affairs of the University, nor is it so vague that "men of common intelligence must necessarily guess at its meaning and differ as to its application." *Baggett v. Bullitt*, 377 U.S. 360, 367 (1964). As stated in *Adderley v. Florida*, 385 U.S. 39, 47 (1966), "The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." Here, appellee in the exercise of its power to govern the University and in pursuit of a valid interest in that area, at most, has only incidentally infringed on First Amendment freedoms. Such being the case, the regulation is not constitutionally infirm. *Cox v. Louisiana*, 379 U.S. 559 (1965). Moreover, any chilling effect on this particular form of protest that might flow from a good faith enforcement of this regulation would not constitute an impermissible invasion of protected freedoms. *Cam-*

eron v. Johnson, 390 U.S. 611, 619 (1968). Additionally, we must recognize that First Amendment rights are not absolute. Regulation as to time, place, and manner of the exercise of such rights is proper when reasonably related to a valid public interest. *Callison v. United States,* 413 F.2d 133 (9th Cir. 1969). We are not here concerned with a regulation prohibiting speakers from using the campus, nor with one which forbids any particular type of political activity. At most, the regulation as here applied has only an incidental effect on First Amendment rights. Its primary goal is the maintenance of order and decorum on the campus. The resolution involves no threat of criminal or other sanction, save the denial of the use of University facilities. It does not threaten freedom of activity or speech in the home or in a privately owned business and consequently there is no analogy to statutes regulating "obscenity."

Having held that the resolution is not unconstitutional on its face, we now hold that it was not unconstitutionally applied by appellee. The record before us supports the holding that appellee acted reasonably in deciding that the proposed event, which included speeches and fund raising in support of men who had pledged not to serve in the Armed Forces, would be a violation of § 462(a). It acted on the advice of its counsel. His opinion that the proposed commencement would violate the statute was not unreasonable. As recently as July 11, 1969, the First Circuit has said that § 462(a) is neither vague nor overbroad. *United States v. Spock,* 416 F.2d 165, 173,

n. 20 (1st Cir. 1969). Inasmuch as appellee reasonably believed that such a program would in itself be illegal, its valid interest in prohibiting illegal activity was immediately threatened by the proposal. We need not go beyond saying that appellee acted reasonably. We express no opinion on the actual applicability of § 462(a) or on its constitutionality. In arriving at this conclusion, we reject the appellants' contention that the standards for immediate *de novo* judicial review required in censorship of "obscenity" cases should here apply. Compare *Teitel Film Corp. v. Cusack*, 390 U.S. 139 (1968); *Bantam Books v. Sullivan*, 372 U.S. 58 (1963). It is our considered opinion that the judicial function, as applied to those in charge of governing the campuses of our universities, should be far less inclusive than the role played by the courts in review of state censorship of an "obscenity," a censorship that reaches into private homes and businesses.

Aside from the three-judge court issue, appellants' pleadings may raise issues under the Declaratory Judgments Act,[5] or the Civil Rights Act,[6] or both. These issues are not presented in appellants' brief.

The belief that the Declaratory Judgments Act broadens the scope of the court's jurisdiction is without foundation. The essential jurisdictional requirements "of sufficient immediacy and reality" remain. *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941). The "controversy" must exist

[5] 28 U.S.C. § 2201.
[6] 42 U.S.C. § 1983.

at the time of the hearing as to the availability of declaratory relief and that determination is entirely independent of any controversy that may have existed in the past. *Golden v. Zwickler*, 394 U.S. 103 (1969). For that matter, declaratory relief cannot be granted where the alleged controversy is hypothetical. *Golden v. Zwickler, supra; United Public Workers v. Mitchell*, 330 U.S. 75 (1947). Appellants here are in no present danger due to their having run afoul of the resolution, nor do they allege that they plan to hold an event similar to their "Vietnam Commencement" in the future. As in *Mitchell*, we can only speculate as to the type of future activity in which CDO will engage. Search as we may, we can find no cause or controversy of sufficient immediacy or definiteness existing at the time of the district court's decision to warrant a declaratory judgment.

Nor do we believe that the Civil Rights Act applies in this factual atmosphere. We draw attention to the fact that the action is being prosecuted against *The Regents of the University of California, a corporation*. The appellee is a corporation created by the Constitution of the State of California. As such, it is not a proper party since it is not a "person" within the meaning of 42 U.S.C. § 1983. *Bennett v. People of the State of California*, 406 F.2d 36, 39 (9th Cir. 1969), *cert. denied* 394 U.S. 966 (1969); *Allison v. California Adult Authority*, 419 F.2d 822 (9th Cir. 1969); *Clark v. Washington*, 366 F.2d 678, 681 (9th Cir. 1966).

Finding no error, we Affirm.

FERGUSON, District Judge Dissenting and Concurring):

This case presents the jurisdictional issue of whether or not a single judge district court may grant summary judgment on the merits in an action seeking to enjoin the enforcement of a statewide administrative order pursuant to 28 U.S.C. § 2281. Following the teaching of the Supreme Court, I must hold that such decision rests exclusively in a statutory three-judge district court constituted pursuant to 28 U.S.C. § 2284, and I therefore dissent.

I concur, however, in the majority opinion which affirms the district court in that part of the action which seeks to enjoin the enforcement of the anti-counseling section of the Selective Service Act.

On May 9, 1968, appellants filed their complaint in the district court alleging in substance:

1. They are members of an unincorporated association at the University of California at Berkeley known as Campus Draft Opposition, a recognized and registered campus organization composed of a large number of students and faculty.

2. Prior thereto, the appellee Regents had adopted the following resolution:

A.

"University facilities shall not be used for the purpose of organizing or carrying out unlawful activity.

B.

"The advocacy and content of speech at University facilities cannot and shall not be restricted beyond the purview of the First and Fourteenth Amendments to the Constitution."

3. The purpose of the Campus Draft Opposition is to provide support for young men who, for reasons of conscience, believe that the actions of the United States in Vietnam are unjust and immoral and who therefore cannot participate in the Armed Forces.

4. On February 26, 1968, appellants applied for use of the Greek Theatre on the Berkeley Campus for the purpose of presenting a "Vietnam Commencement" on May 17, 1968. The purpose of the program was to honor those young men who had taken a position favored by the association concerning services in the Armed Forces.

5. On March 4, 1968, the University Administration approved the use of the facility subject to the conditions that (a) its use comply with established standard requirements, (b) the association make it clear that the event was not sponsored or approved by the University, and (c) the planned use was not illegal.

6. In order to obtain an opinion in regard to the third condition (no illegal use), the matter was referred to the General Counsel of the University. He concluded that the "Vietnam Commencement" event would result in a violation of

50 U.S.C. app. § 462(a), the anti-counseling section of the Selective Service Act, and therefore would not be consistent with Part A of the Regents' Resolution.

7. Appellants resubmitted their application, stating that there was no intent to act outside the law, and set forth that it would stress the fact that the program was not sponsored by the University, the ceremony would deliberately avoid mimicking any official ceremony, there would be no academic procession or presenting of "honorary degrees," there would be no fund raising, and all janitorial and police services would be in accordance with university regulations.

8. The featured speaker was to be Dr. Robert M. Hutchins, former President of the University of Chicago and now Director of the Center For the Study of Democratic Institutions.

9. The General Counsel was again asked for his opinion. The request was accompanied by a written opinion of five professors of law at the Law School, which concluded that appellants' planned activities in the Greek Theatre would not be in violation of the law.

10. Again, the General Counsel determined that in his opinion the "very nature of the proposed event, with these central aspects of honoring and pledging assistance [to draft eligible men who have signed a pledge of refusal to serve in the Armed Forces], is such as to counsel, aid or abet draft eligible men to refuse induction." The

Administration, therefore, denied the request for the assembly.

11. The administrative denial was appealed to the Regents. On April 19, 1968, the Regents adopted the following order, fourteen in favor, three opposed and two not voting:

> "After giving full consideration to the appeal and material submitted in support of it (Viet Nam Commencement) and the opinion of the general counsel that violations of law will occur in the course of the event if held as proposed, and it appearing that because of the history and format of the proposed 'commencement' it would be widely regarded as being a University ceremony if held on the campus, it is the determination of the Regents that permission should not be granted for the holding of the proposed 'Viet Nam Commencement.'
>
> "For these reasons, The Regents hereby deny the appeal of the Campus Draft Opposition."

12. The Greek Theatre is a large outdoor amphitheatre seating 10,000 persons. The facility is not reserved exclusively for university-sponsored events but is frequently used for political speeches and rallies, and had recently been used for a rally supporting "Black Power."

13. The facilities of the University of California are frequently and regularly used by registered campus organizations for meetings expressing political points of view on the war in Vietnam as well as numerous other political subjects. The Campus Draft Opposition has itself used

campus facilities on numerous occasions for promulgation of its program after complying with all applicable administrative requirements for such activities on the Berkeley campus.

14. A ceremony honoring persons who state they will decline to serve in the Armed Forces does not violate 50 U.S.C. app. § 462(a) nor any other law.

15. The denial of the use of the Greek Theatre for the reasons given abridges the appellants' federal rights to freedom of speech, association and assembly, as well as their rights under the equal protection clause of the Fourteenth Amendment.

Appellants then prayed for an injunction to restrain appellee from prohibiting the meeting of May 17, 1968, an order declaring that Part A of the Regents' Resolution is an unconstitutional prior restraint of free expression and assembly, and for monetary damages.

In support of and in opposition to a motion for a preliminary injunction, both sides filed affidavits and documentary evidence, and on May 16, 1968, a single judge district court denied appellants' request for a preliminary injunction. I set aside a detailed discussion whether such a matter must be determined by a statutory three-judge court. A single judge does not have jurisdiction to deny after a hearing a request for an interlocutory or preliminary injunction to restrain the enforcement of a state statute on the ground

of unconstitutionality. *Ex parte Metropolitan Water Co.,* 220 U.S. 539 (1911). Where a party seeks an injunction in a case which must be heard by a statutory three-judge district court, and the orderly course of pleading would include the filing of an application for the convening of such a court, the single district judge to whom the case is assigned has the duty to initiate the necessary procedure for setting up such a court, even though a request is not made therefor. *Borden Co. v. Liddy,* 309 F.2d 871 (8th Cir. 1962), *cert. denied,* 372 U.S. 953 (1963), and *Bell v. Waterfront Comm'n of New York Harbor,* 279 F.2d 853 (2d Cir. 1960).

On July 19, 1968, plaintiffs, pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, filed an amendment to their complaint, contending:

> (1) They plan to continue the activities of the Campus Draft Opposition during the academic year commencing in September of 1968 and as long as the compulsory draft under the Selective Service System continues to affect students, employees and faculty at the University of California.
>
> (2) The defendants would continue to rely on 50 U.S.C. app. § 462(a) to deny plaintiffs their full rights of freedom of expression and assembly.
>
> (3) Part A of the Regents' Resolution is an unconstitutional prior restraint of freedom of speech and assembly on its face and as applied.

Appellants also requested that a three-judge district court be convened pursuant to 28 U.S.C. § 2284 to en-

join the enforcement of the federal statute and Part A of the Regents' Resolution.

Appellee, thereupon, filed a motion to dismiss the action for failure to state a claim upon which relief can be granted, and to deny the request to convene a three-judge district court.

On September 25, 1968, the district court, relying on affidavits filed in the matter, dismissed the action on its merits and denied the request to convene a three-judge court. As stated in the majority opinion of this court, the dismissal was in effect a summary judgment under Rule 56 of the Federal Rules of Civil Procedure. The district court found as facts: (a) the denial of permission to use the Greek Theatre was based on the alternative and independent ground that the planned program would be widely regarded as being a University ceremony if held on campus; (b) there was no present justiciable controversy involving the federal statute or the Regents' Resolution; (c) there was no substantial federal question presented in regard to either the statute or the resolution; (d) the Regents' Resolution was not a statewide statute of general application reviewable by a three-judge court under 28 U.S.C. § 2281; (e) the defendants were not responsible for enforcing the federal statute and thus the case was not proper for a three-judge court pursuant to 28 U.S.C. § 2282; (f) the complaint failed to state a claim upon which relief could be granted; (g) the denial of permission was a reasonable and lawful exercise of defendant's authority in governing the University of California; and (h) any incidental

restrictions upon the exercise of First Amendment freedoms were fully justified by the valid and compelling interests of defendant giving rise to the denial of permission.

The single district court judge did not have jurisdiction to dismiss the complaint on its merits. *Idlewild Liquor Corp. v. Epstein*, 370 U.S. 713 (1962), states, "When an application for a statutory three-judge court is addressed to a district court, the court's inquiry is appropriately limited to determining whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute." 370 U.S., *supra* at 715.

The limited power of the single judge is specifically set forth in *Stratton v. St. Louis S. W. Ry.*, 282 U.S. 10 (1930), at 15:

> "If an application for an interlocutory injunction is made and pressed to restrain the enforcement of a state statute, or of an administrative order made pursuant to a state statute, upon the ground that such enforcement would be in violation of the Federal Constitution, *a single judge has no jurisdiction to entertain a motion to dismiss the bill on the merits. He is as much without power to dismiss the bill on the merits, as he would be to grant either an interlocutory or a permanent injunction.* His authority is strictly limited to granting upon proper cause being shown a temporary restraining order to be effective only pending the determination of the application for an interlocutory injunction. Upon

making such an order, it is his duty immediately to call two other judges, as the statute directs, to assist him in hearing and determining that application. *Ex parte Northern Pacific Railway Company,* 280 U.S. 142, 144." [Emphasis added.]

The University of California consists of nine state university campuses throughout California. It is administered pursuant to Article IX, Section 9, of the Constitution of the State of California by the appellee Regents of the University of California "with full powers of organization and government, subject only to such legislative control as may be necessary to insure compliance with the terms of the endowments of the university and the security of its funds."

A description of the functions and powers of the Regents is given in *Ishimatsu v. Regents of University of California,* 266 Cal.App.2d 854, 863-874, 72 Cal. Rpts. 756, 762-763 (1968), as follows.

"The authority and powers granted to the University are extensive . . . The regents have been variously described as 'an institution of the state,' 'a public corporation,' and 'a governmental agency,' (*Estate of Royer, supra,* 123 Cal. 614, 619, 620); a 'public trust,' and 'a governmental institution,' (*City Street Improv. Co. v. Regents etc. Cal.,* 153 Cal. 776, 777, 779 [96 P. 801, 18 L.R.A. N.S. 451]); 'a constitutional department or function of the state government,' (*Williams v. Wheeler,* 23 Cal. App. 619, 622 [138 P. 937]; 'a governmental function.' (*Davie v. Board of Regents, etc. Cal.,* 66 Cal. App. 693, 696 [227 P. 243]); 'a state institution' (*Estate of Purington,* 199 Cal. 661, 666 [250 P. 657]); and 'a branch

> of the state itself,' (*Pennington v. Bonelli*, 15 Cal. App. 2d 316, 321 [59 P. 2d 448]). (See also 30 Ops. Cal. Atty. Gen. 162, 166; *Newmarker v. Regents of University of Cal.*, 160 Cal. App. 2d 640 [324 P.2d 558].)
>
> "The Attorney General, in commenting on the autonomy granted the regents, stated: '. . . It is a constitutional corporation or department and constitutes a branch of the state government equal and coordinate with the legislature, the judiciary and the executive. [Citations.] . . . The Regents, not the legislature, have the general rule-making or policy-making power in regard to the University . . . It is clear, however, that the power of the Regents to operate, control and administer the university is virtually exclusive.' (30 Ops. Cal. Atty. Gen., 162, 166.)"

Appellee is therefore a statewide administrative agency, and its resolutions, policies and orders are within the operative effect of 28 U.S.C. § 2281. *Gilmore v. Lynch*, 400 F.2d 228 (9th Cir. 1968); *Marshall v. Sawyer*, 301 F.2d 639 (9th Cir. 1962); *Hatfield v. Bailleaux*, 290 F.2d 632 (9th Cir. 1961).

While a single judge may not dismiss on its merits a case under § 2281, he may dismiss if the complaint on its face does not present a substantial federal question. *Bell v. Hood*, 327 U.S. 678 (1946). The Supreme Court, in *Ex Parte Poresky*, 290 U.S. 30, 32, set forth the rule that: "The question may be plainly unsubstantial, either because it is 'obviously without merit' or because 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the

subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.'" This criterion was followed in *California Water Service v. City of Redding*, 304 U.S. 252 (1938).

The facts alleged in the original and amended complaints present a question that is not "obviously without merit," and there are "no decisions of the Supreme Court which have foreclosed the subject."

The complaint alleges that the challenged Regents' Resolution was and is used by the defendants as a prior restraint to prohibit a peaceful public assembly and to restrain plaintiffs' First Amendment rights. This is clear from the fact that the use of the Greek Theatre was approved by the Administration subject to the opinion of the General Counsel. The General Counsel ruled that the assembly would violate the resolution, and it was on that basis that the use of the Greek Theatre was denied.

The district court found that the use was denied on the alternate and independent ground that "because of the history and format of the proposed 'Commencement,' it would be widely regarded as being a University ceremony if held on the campus . . ." That finding is impermissible under *Idlewild Liquor Corp.* and *Stratton, supra.* Appellants contend that the stated reason is a sham. It is a question of fact and must await a trial on the merits before a three-judge court.

Furthermore, the alleged "alternate and independent ground" for denial is seriously challenged by

appellants as an unconstitutional prior restraint of speech and peaceful assembly because of its vagueness and overbreadth. *Shelton v. Tucker,* 364 U.S. 479 (1960), holds that, ". . . even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." 364 U.S., *supra* at 488.

The use of the Regents' Resolution to act as a prior restraint upon speech and peaceful assembly is condemned in *Carroll v. Commissioners of Princess Anne,* 393 U.S. 175 (1968). Sanctions against appellants may take the form of criminal prosecutions for violations of valid laws, but may not take the form of prior censorship, absent a showing in an adversary proceeding of a clear and present danger of riot and disorder. The appellants alleged that the assembly would be held with proper police supervision, and that allegation was uncontested before the single district court judge.

The Regents' Resolution, as applied to the facts of this case, is further subject to the serious constitutional infirmities set forth by the Supreme Court in *Shuttlesworth v. Birmingham,* 394 U.S. 147 (1969), and *Brandenburg v. Ohio,* 395 U.S. 444 (1969). In *Brandenburg,* the court stated ". . . the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless

action and likely to incite or produce such action." 395 U.S. at 447. As condemned in *Shuttlesworth*, the Regents' Resolution ". . . was administered so as, in the words of Chief Justice Hughes, 'to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought . . . immemorially associated with resort to public places.'" 394 U.S. at 159.

The majority contends that the pleadings and *affidavits* are insufficient to state a claim for injunctive relief and, therefore, the requirement that the plaintiffs must at least formally allege the basis for equitable relief has not been met. In making that determination based in part upon the affidavits, the majority has decided the matter on its merits, a decision which the courts of appeals are without jurisdiction to render under 28 U.S.C. § 2281. That jurisdiction is reserved for three-judge district courts and the Supreme Court under 28 U.S.C. § 1253. "In the *Stratton* case it was held that a court of appeals was precluded from reviewing on the merits a case which should have originally been determined by a court of three judges." *Idlewild Liquor Corp., supra* at 715-716.

The Case is not moot. When there is a prior restraint of First Amendment rights and the censor persists in its policies, the issues continue. Although the date of the assembly which was the focal point of the litigation has long since passed, the appellants still live, the Vietnam war still continues, the Regents' Resolution is still in effect, there is still a compulsory draft under the Selective Service System, and appel-

lants assert that they will continue in their activities. The underlying question persists and is agitated by the continuing activities and program of petitioners: whether, by what process, and to what extent the authorities . . . may restrict petitioners in their rallies and public meetings." *Carroll v. Princess Anne, supra* at 179.

The majority holds that *on the record as a whole* there is no threat of irreparable harm and no chilling effect on First Amendment rights. That determination must be for some court other than this one. Furthermore, what remedy lies to prohibit the censor except by injunction? The Supreme Court has uniformly held that an injunction is the effective remedy. *W. Va. State Bd. of Educ. v. Barnette,* 319 U.S. 624 (1943); *Hague v. C.I.O.,* 307 U.S. 496 (1939). And, "It makes no difference that the instant case was not a criminal prosecution and not based on a refusal to comply with a licensing requirement." *N.A.A.C.P. v. Button,* 371 U.S. 415, 432 (1963).

The majority asserts that the complaint was properly dismissed because although appellants allege that they will continue in their efforts in regard to the war in Vietnam and the Selective Service System, they fail to allege that any event similar to the Vietnam Commencement is planned for the future. As stated in *Conley v. Gibson,* 355 U.S. 41, 47-48 (1957):

> "The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules

Appendix B

United States District Court
Northern District of California

No. [illegible]

Charles Sellers, Richard Strohman and Bruce Kimmons, individually and as members of the Campus Draft Opposition, on behalf of themselves and others similarly situated,

Plaintiffs,

vs.

The Regents of the University of California, a corporation,

Defendant.

MEMORANDUM OF DECISION

In view of the fact that the so-called "Commencement" Exercise, involved in this case, was planned to take place tomorrow, May 17th, in the Greek Theatre, University of California, the court promptly makes known its decision on the plaintiffs' Committee in Opposition to the Draft application to the Court (heard and argued this morning) for a preliminary injunction against the defendant Board of Regents enjoining it from refusing to issue a permit for the so-called Commencement.

The Chancellor of the University denied the application for such a permit on March 14, 1968 and on April 19th the Board of Regents affirmed such denial on the ground that violations of law would occur in the course of the event, if held as proposed, and on the further ground that, because of the history and format of the proposed "Commencement", it would be widely regarded as being a University ceremony if held on the campus.

After full consideration of the complaint, affidavits, counter-affidavits, evidentiary exhibits in the record, briefs of the parties and amicus curiae and oral argument this morning, the court finds and concludes that the plaintiff Committee's application for a preliminary injunction should be and is hereby denied.

In due course the court will file a Memorandum explaining its reasons for this order. At this point, however, time permits only a general statement of the court.

Essentially, the preliminary injunction is denied upon the ground that the plaintiff Committee has failed to show that, absent such preliminary injunction, it will sustain irreparable injury; that plaintiff Committee has failed to show that the refusal of their application by the Chancellor on May 14th and affirmance of that refusal by the Board of Regents on April 19th, was not a reasonable exercise of the powers vested by the law of California in the Board of Regents and, through that Board, in the Chancellor; that plaintiff Committee has failed to show that any claimed limitation upon their First Amendment rights

of freedom of speech and assembly, resulting incidentally from the refusal to permit the "Commencement" as proposed, is not reasonably justified by the valid interest of the University in maintaining good order and decorum on its campus.

The Court finds to the contrary of plaintiff Committee's contentions as to each of the issues above set forth.

This Memorandum constitutes the Findings and Conclusions of the Court for purposes within the meaning of Rule 52, Fed. R. Civ. P.

Dated: May 18, 1968.

W. T. Sweigert
United States District Judge